United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1008

to be argued by ROBERT H. PLAXICO

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P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

FRANK ALTESE, a/k/a Frankie Feets, et al.,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

QUESTION PRESENTED

1. 18 U.S.C. 1962(c) makes it unlawful to conduct "any enterprise" engaged in or affecting interstate or foreign commerce "through a pattern of racketeering activity or collection of unlawful debt."

The issue presented is whether the district court properly interpreted the term "any enterprise" in Section 1962(c) to mean only legitimate businesses.

STATUTES INVOLVED

18 U.S.C. 1962 provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. 1961 provides in pertinent part:

> (1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce,robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement

from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

* * * *

PRELIMINARY STATEMENT

This is an appeal pursuant to 18 U.S.C. 3731, from an order of the United States District Court for the Eastern District of New York (Mishler, C.J.) entered on November 26, 1975, which dismissed prior to trial four counts of an eight-count indictment (App. 6-16) alleging gambling and racketeering offenses in violation of the Organized Crime Control Act of 1970, 84 Stat. 922 (hereinafter "the Act"). The district court's order is being appealed only as to the dismissal of counts one and two, charging violations of 18 U.S.C. 1962(c) and (d), 84 Stat. 942-43.

STATEMENT OF FACTS

1. The Indictment Below.

Twenty-two defendants were variously charged in the eight-count indictment. Count one charged sixteen of the defendants[1/] with being associated with an enterprise engaged in interstate commerce and conducting its affairs through a pattern of racketeering activity and through the collection of debts in violation of 18 U.S.C. 1962(c). All defendants were charged in count two with having conspired to violate Section 1962(c), in violation of 18 U.S.C. 1962(d). The gravamen of these counts was that the defendants had conducted

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1/ Salvatore Annarumo, Martin Cassella, Jerry D'Avanzo, Michael DeLuca, Anthony DiMatteo, John Lotierzo, Sr., Pasquale Macchirole, Bario Mascitti, Anthony Mascuzzio, James V. Napoli, Sr., James Napoli, Jr., Henry Radziewicz, Eugene Scafidi, Joseph Simonelli, Sabato Vigorito, and Robert Voulo.

a large scale gambling business through a pattern of racketeering activity and collection of unlawful debts, as defined in 18 U.S.C. 1961(1), (5), and (6).

In addition, count three charged four of the defendants[2/] with having conducted, managed, supervised and directed an illegal gambling business from March, 1972 until July, 1972, in violation of 18 U.S.C. 1955. Count four charged five defendants[3/] with a Section 1955 violation occurring between December, 1972, and March, 1973. In count five, fourteen defendants[4/] were charged with another Section 1955 violation arising between April, 1973, and June, 1973.

In count six, four defendants[5/] were charged with a violation of 18 U.S.C. 1952. Count seven charged two defendants[6/] with obstruction of justice in violation of 18 U.S.C. 1510. Counts six and seven were dismissed with the government's acquiescence, for failure to allege essential elements of the offenses (App. 22-23). Count eight charged all defendants with having conspired to violate Sections 1955 and 1952, in violation of 18 U.S.C. 371.

2/ Salvatore Annarumo, Jerry D'Avanzo, Eugene Scafidi, and Robert Voulo.
3/ Anthony DiMatteo, Bario Mascitti, Rocco Riccardi, Eugene Scafidi and Robert Voulo.
4/ Salvatore Annarumo, Saverio Carrara, Martin Cassella, Michael DeLuca, Anthony DiMatteo, John Lotierzo, Sr., Pasquale Macchirole, Bario Mascitti, Anthony Mascuzzio, James V. Napoli, Sr., James Napoli, Jr., Henry Radziewicz, Sabat Vigorito, and Robert Voulo.
5/ Martin Cassella, Pasquale Macchirole, James V. Napoli, Sr., and Henry Radziewicz.
6/ Pasquale Macchirole and James V. Napoli, Sr.

2. The Order Dismissing The Section 1962(c) and (d) Counts.

Subsequent to the filing of this indictment, certain of the defendants moved that counts one and two, charging violations of 1962(c) and (d), be dismissed for failure to state an offense. Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The defendants claimed that this statute applies only to a legitimate enterprise conducted through a pattern of racketeering activity or collection of unlawful debts and that since the enterprise described in count one was an illegal gambling business the statute was improperly charged against them.

This argument was accepted by the court below (App. 17-22) which accordingly dismissed counts one and two. The district court held that Title IX of the Organized Crime Control Act, of which Section 1962(c) is a part, "deals with the problem of infiltration of legitimate business by persons connected with organized crime" (App. 19). The court concluded that the statute on its face and by reference to its legislative history indicated a Congressional intent "not to cover the type of activity charged in [counts one and two of] this indictment" (App. 19). The decision below was also influenced

by the fact that illegal gambling businesses are proscribed by 18 U.S.C. 1955, which is part of Title VIII of the Organized Crime Control Act (App. 20).

In rendering this decision, Judge Mishler assumed a position contrary to that adopted by Judge Bartels in United States v. Castellano, et al. (75-CR-521, decided November 11, 1975, motion for reconsideration denied December 30, 1975), which approved the application of Section 1962(c) to an illicit enterprise (App. 28-50). The defendants in Castellano are charged with having participated in an enterprise engaged in loaning money at usurious interest rates and collecting unlawful debts.[7/]

3. The Legislative Scheme of Title IX.

At the outset, we briefly summarize the provisions of Title IX in order to place Section 1962(c) in context. Title IX, is labeled "Racketeer Influenced and Corrupt Organizations," and Section 1962 constitutes the three- part proscriptive portion of the legislation.

Section 1962(a) prohibits any person who has received income from a pattern of racketeering activity or through the collection of an unlawful debt from investing such income in the acquisition of any enterprise engaged in or affecting interstate or foreign commerce. Section 1962(b) prohibits any person from acquiring or maintaining any interest in any such enterprise

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7/ Another lower court in this circuit has decided, in accord with the holding below, that "any enterprise" as used in Section 1962 means only legitimate business. See United States v. Moeller, 402 F. Supp. 49, 58-60 (D. Conn., 1975, Newman, J.).

through a pattern of racketeering activity, or through collection of an unlawful debt. Finally, Section 1962(c) bars any person associated with any such enterprise from participating in the conduct of the enterprise's affairs through a pattern of racketeering activity, or collection of unlawful debt.

Section 1961 provides definitions of these terms. Section 1961(3) defines person as "any individual or entity capable of holding a legal or beneficial interest in property." Enterprise is defined in Section 1961(4) as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Racketeering activity means any act constituting a violation of variety of enumerated state or federal offenses [Section 1961(1)], and pattern of racketeering activity is defined as at least two acts of such racketeering activity [Section 1961(5)]. Unlawful debt is a debt incurred through an illegal gambling activity or which is unenforceable because violations of state or federal usury laws [Section 1961(6)].

In short, Title IX seeks to bar the investment of racketeering moneys, the acquisition of property through a pattern of racketeering activity, or unlawful debt collection, and the conduct of an enterprise through a pattern of racketeering activity or unlawful debt collection.

Title IX includes two enforcement sections, a criminal penalty provision (Section 1963) and a civil remedy (Section 1964). Under the former, one guilty of violating any part of Section 1962 is subject to twenty years' imprisonment and a $25,000 fine; in addition, any interest acquired or maintained in violation of Section 1962 is subject to forfeiture. Under the civil remedy section, the courts are empowered to enjoin violations of Section 1962 and to order divestiture of interests in any enterprise improperly acquired.[8/]

ARGUMENT

I. THE NARROW INTERPRETATION IMPOSED UPON SECTION 1962(c) BY THE COURT BELOW IS CONTRARY TO THE EXPLICIT WORDING OF THE STATUTE AND CONTRAVENES THE GENERAL LEGISLATIVE SCHEME OF TITLE IX.

There is no support for the conclusion reached below that "a reading of the statute" (App. 19) evinces a Congressional intent not to include illegitimate businesses conducted through a pattern of racketeering activity or unlawful collection of debts within the purview of Section 1962(c). To the contrary, Section 1962(c) and Title IX in its entirety provide in clear, unambiguous wording that any enterprise which is conducted through a pattern of racketeering activity or collection of unlawful debts falls within their proscriptions. The statute, in short, is clear on its face.

8/ Sections 1965-1968 provide special rules for venue and process, expediting proceedings, and subpoena powers.

Rather than fashion a narrow statute, applicable only in unique circumstances, the Congress promulgated a broad, far reaching legislative scheme to ensnare a wide variety of major criminal activity, regardless of whether it directly affected a legitimate business. Thus, in the prelude to the Organized Crime Control Act, it is stated:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. 84 Stat. 923 (emphasis added)

Consistent with this purpose, the Congress has provided that "[t]he provisions of this title [Title IX] shall be liberally construed to effectuate its remedial purposes" (84 Stat. 947), an admonition recognized by this Court in United States v. Parness, 503 F.2d 430, 439 n. 12 (2nd Cir. 1974), cert. den. 419 U.S. 1105.

The "new penal prohibitions," "enhanced sanctions" and "new remedies" of Title IX clearly extend to the conduct of an illegitimate business through a pattern of racketeering activity. The words "legitimate business" or "illegitimate business" appear nowhere in Title IX and nowhere within the title does the Congress evince an intent to distinguish between normal and illicit activities conducted through racketeering activity.

Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. (emphasis added)

The section thus speaks of any enterprise and does not delimit the phrase to legitimate enterprises. As Judge Bartels noted in Castellano, supra: "If Congress wished to restrict the word 'enterprise' to 'legitimate enterprise' in the statute, it knew how to do so simply adding the word 'legitimate' in front of the word 'enterprise' (App. 41). Further, Section 1961, the definition section of Title IX, provides an explicit and all encompassing definition of enterprise, including non-legal groups, wholly contravening the restrictive interpretation of the decision below:

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. (emphasis added)

This same broad and unrestricted terminology with regard to the term "enterprise" is followed throughout Title IX. Section 1962(a) prohibits the investing of funds secured from racketeering activity in any enterprise. Section 1962(b) similarly prohibits acquiring an interest in any enterprise through a pattern of racketeering activity. In the criminal penalty provision, Section 1963, it is provided that one

guilty of a violation of any part of Section 1962 will forfeit any interest acquired in "any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, . . ." (emphasis added). Also, in the civil remedy provision, Section 1964, the courts are empowered to force divestiture ". . . of any interest, direct or indirect, in any enterprise, . . ." (emphasis added).

Given the presence of the wholly unencumbered term "any enterprise" throughout Title IX, we submit that its use in Section 1962(c) was due to no legislative oversight, but rather manifests the clear intent to proscribe the conduct of specified activities through a pattern of racketeering activity or colle tion of unlawful debts. As the Supreme Court noted recently in Iannelli v. United States, 420 U.S. 770, 789, the Organized Crime Control Act "is a carefully crafted piece of legislation." Indeed, the statute is so clear on its face that neither the order below, nor Judge Newman's decision in Moeller, allude to any ambiguities in the terminology of Section 1962(c) which might support their more narrow interpretations. Indeed, Judge Newman conceded that "[t]he statutory definition of 'enterprise' contains no words or limitation concerning the lawfulness of activities." 402 F.Supp. at 58.

Further, the district court's restrictive definition of enterprise to mean legitimate business produces an illogical result and in effect partly nullifies the statute's definition of racketeering found in Section 1961(1). Under Section

1961(1), racketeering activity is defined as any of a number of enumerated state and federal criminal offenses. Some of these offenses, i.e., bribery or extortion, could conceivably be perpetrated by either a so-called legitimate business or an illegal business. However, others, such as narcotics offenses, sports bribery (18 U.S.C. 224) and white slave traffic (18 U.S.C. 2421-24), would hardly be likely to be conducted pursuant to a legitimate enterprise. The inclusion of such offenses within the definition of racketeering activity thus demonstrates the function of 1962(c) to prohibit the conduct of any enterprise through racketeering activity.

Indeed, we believe that the recognition of a legitimate/illegitimate dichotomy would generate a standard difficult to apply and likely to nullify the intended broad reach of Section 1962(c). For instance, a group of individuals might combine to extort protection money from all the dry cleaning establishments in a particular area; this enterprise would clearly be classified as illegitimate. But if this same group purchased one of the establishments, and then proceeded by unlawful means specified in Section 1961(1) to drive the other business out of operation, it is questionable whether the enterprise would be any more legitimate than the first or less subject to a dismissal order on the reasoning of the court below. But if a distinction is drawn between these two forms of activity, there is an anamolous result in which only one of two equally deleterious schemes, different only cosmetically, is subject to prosecution.

As further examples, one might consider as to which of the district court's categories to place these type of enterprises: (1) a group which formally incorporates a business to rent juke box machines, though with the express and effected purpose of conducting the business by using force to secure outlets for its products, and (2) a group, without any formal incorporation or other indicia of business legitimacy, which markets stolen merchandise [18 U.S.C. 659, 1951, 2314, and 2315 are included in Section 1961(1)]. In the first case, the enterprise is facially legitimate, but conducted through wholly illegal means; in the second, there is no patina of formal legitimacy, but the group does conduct traditional sales activity, albeit of illegally obtained merchandise. In short, it is inappropriate - in the absence of any palpable statutory limitation - for the court to attempt to determine on an ad hoc basis the precise point at which an enterprise is no longer legitimate and thus immune from prosecution under Section 1962(c). These conundrums of statutory interpretation do not occur, however, if Section 1962(c) is simply applied, as its wording unambiguously dictates, to any enterprise, as enterprise is broadly defined in Section 1961(4), conducted through a pattern of racketeering activity or collection of unlawful debt. When faced with statutory challenges to Title IX, the courts have generally adopted this position, accepting the clear wording of that title as it stands facially.

In United States v. Campanale, 518 F.2d 352 (9th Cir., 1975), a group of defendants were charged with conspiracy to conduct the affairs of a labor union through a pattern of racketeering activity, in violation of Sections 1962(c) and (d). These individuals sought to defend, as here, by advocating a narrow reading of the statute. Specifically, they argued that the term "any person" in Sections 1962(c) and (d) meant any person engaged in organized crime and that enterprise meant only large business enterprises. This restrictive interpretation was rejected by the Ninth Circuit, which noted that "[t]he words of the statute are general" and do not contain the limitations urged. [Id. at 364.]

This Court has also rejected attempts to narrow the scope of Title IX. In United States v. Parness, 503 F.2d 430 (2nd Cir., 1974) cert. den. 419 U.S. 1105, the defendant was convicted under Section 1962(b) of having acquired control of an enterprise through a pattern of racketeering activity. Section 1962(b) uses terminology similar to that found in Section 1962(c) and prohibits the acquisition of "any interest in or control of any enterprise which is engaged in or the activities of which affect interstate or foreign commerce." (emphasis added) Addressing this statute, the defendant argued that any enterprise meant only domestic enterprises, and thus did not extend to the foreign corporation which he had acquired. This restrictive view was rejected by this Court, which held the words "any enterprise" to mean precisely that:

> This argument is predicated upon an unreasonably narrow interpretation of the statute and is refuted by the language and legislative history of Section 1962(b).
>
> * * * *
>
> On its face the proscription is all inclusive. It permits no inference that the Act was intended to have a paraochial application.
>
> * * * *
>
> There is no indication that the statute was meant to have such a limited remedial scope. On the contrary, its legislative history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises.
>
> * * * *
>
> In short, we find no indication that Congress intended to limit Title IX to infiltration of domestic enterprises. On the contrary, the salutary purposes of the Act would be frustrated by such construction. It would permit those whose actions ravage the Amerian economy to escape prosecution simply by investing the proceeds of their ill gotten gains in a foreign enterprise. We reject any such construction. [Id. at 439]

This same reasoning, we submit, applies to the instant case as well. Considering the general protective and remedial aims of the Organized Crime Control Act, it would appear anomalous to prosecute only those who function illegally within a facade of a normal business while ignoring others who act with the same illegal methods but without the guise of everyday businessmen.

The Seventh Circuit in United States v. Capetto, 502 F.2d 1351 (7th Cir., 1974), cert. den. 420 U.S. 925,has expressly rejected the construction of Section 1962(c) adopted by the court below. Capetto involved a civil action in which the government, charging a violation of 1962(c) through the maintenance of a gambling business, sought to invoke the civil divestiture remedies of Section 1964. As in the case at bar, the defendants attempted to remove themselves from the purview of the statute by contending that 1962(c) applied only to the conduct of legitimate businesses. The court rejected this claim, stating:

> While one of Congress' targets was "the infiltration of legitimate organizations by organized crime" (Sen. Rep. 91-617, p. 80 (1969), and subsection (a) of Section 1962 is aimed at that target, Congress also intended to prohibit any pattern of racketeering activity in or affecting commerce; and subsections (b) and (c) of Section 1962 specifically prohibit such activity. Subsection (b) forbids acquiring or maintaining an interest in an enterprise which affects commerce through a pattern of racketeering activity or through collection of an unlawful debt; and subsection (c) forbids participation in the affairs of such an enterprise through those means. That Congress intended to give the term "enterprise" a very broad meaning is recognized in a recent Second Circuit case United States v. Parness, . . . There is nothing in the language of

> subsection (b) or (c) or in the definition section of the Act, Section 1961, to suggest that the enterprise must be a legitimate one. 9/ [Id. at 1358; footnote supplied]

Rather than following the Congressional directive to construe the provisions of Title IX literally "to effectuate its remedial purposes," the court below modified the term "any enterprise" to mean only legitimate enterprises. The broad language used in the statute does not support this delineation, which introduces ambiguities not present in the statute or its face. Consistent with the plain language of the statute and the broad purpose of the Organized Crime Control Act "to seek the eradication of organized crime in the United States," this Court should reject the limitation engrafted upon Section 1962(c) by the Court below.

9/ By analogy, one can refer to current judicial treatment of 18 U.S.C. 894 (part of Title II of the Consumer Protection Act Pub. L. 90-321, 82 Stat. 161) which proscribes "the use of any extortionate means (1) to collect or attempt to collect any extension of credit" (emphasis added). Confronted with contentions that the statute extends only to the collection of loans in the traditional sense, rather than debts arising from unlawful transactions (e.g., gambling or narcotic debts), the courts of appeals have refused to impose an interpretation more narrow than the broad wording of the statute. "Congress intended to attack the economic base of organized crime and therefore did not restrict its efforts to those financial dealings which necessarily included each of the various attributes of a loan shark transaction," United States v. Keresty, 465 F.2d 36, 40 (3rd Cir., 1972), cert. den., 409 U.S. 991; see also United States v. Briola, 465 F.2d 1018 (10th Cir., 1972), cert. den., 409 U.S. 1108 (1973); United States v. Andrino, 501 F.2d 1373, 1376-1378 (9th Cir., 1974).

II. THE LEGISLATIVE HISTORY OF TITLE IX OF THE ORGANIZED CRIME CONTROL ACT OF 1970 DOES NOT SUPPORT THE DISTRICT COURT'S HOLDING THAT THE STATUTE APPLIES ONLY TO "LEGITIMATE" BUSINESSES.

A. Application Of 1962(c) To Illegal Enterprises Denies Organized Crime Its Major Source Of Income And Thus Is In Comport With The Legislative Aim To Prevent Investment In Regular Businesses By Criminal Elements.

Should the Court determine to examine the legislative history of Title IX, notwithstanding the facial clarity of Section 1962(c),[10/] no position contrary to that espoused above is indicated. The decision below and the Moeller holding were based primarily upon a determination that within the legislative history of the Organized Crime Control Act there is apparent a Congressional intent to prevent the infiltration of organized crime into normal commercial businesses. While as we shall discuss below the Act manifests a broader purpose as well, one cannot gainsay the fact that a significant purpose of the legislation was, as Judge Mishler observed, to address "the

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10/ When no ambiguity is apparent on the face of a statute, examination of legislative history is not required of the court. "It must be assumed 'that the legislative purpose is expressed by the ordinary meaning' of words used in the statute. [citations omitted] [A]nd where they have a basic and usual sense, they require no resort to legislative history. [citations omitted] The proper function of legislative history is to solve and not to create an ambiguity." United States v. Blasius, 397 F.2d 203, 205-206 (2nd Cir., 1968), cert. granted 393 U.S. 950, cert. dismissed 393 U.S. 1008. See also United States v. Oregon, 366 U.S. 643, 648 (1960); Richards v. United States, 369 U.S. 1, 9 (1961); Ex Parte Collett, 337 U.S. 55, 61 (1949); Wirtz v. Local 191, 321 F.2d 445, 448 (2nd Cir., 1963); American Tel. & Tel. Co. v. F.C.C., 503 F.2d 612, 616 (2nd Cir., 1974).

problem of infiltration of legitimate businesses by persons connected with organized crime." (App. 19) 11/

But the recognition of this particular purpose hardly leads to the conclusion that Section 1962 applies only in the case of an actual infiltration of a "legitimate" business. Rather, acceptance of the broad definition of "enterprise" employed by the Congress fully comports with the stated Congressional goal of arresting the infiltration of regular commerce by organized crime. By prohibiting the functioning of large-scale illegitimate enterprises, participants in them are denied the sources of income used to invest in legitimate businesses.

Section 1962 is, as Judge Mishler noted in examining the legislative history of Title IX, a three-pronged prohibition against racketeering activity. First, Section (a) prohibits the investment of money secured from specified illicit sources into any enterprise. This will obviously help prevent the infiltration of legitimate businesses, as will Section (b), which proscribes the acquisition of any enterprise through a pattern of illegal activity.

Finally, Section (c) prohibits conducting any enterprise through a pattern of racketeering activity. Application of this section to the conduct of a regular business through racketeering methods will serve to mitigate the

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11/ See generally S. Rep. 91-617, 91st Cong., 1st Sess. (1969) pp. 76-83; Moeller, supra, 402 F. Supp. at 58, n. 8.

deleterious effects on commerce of a business which has already been infiltrated. But when, as here, it is invoked against a large-scale illicit activity, the effect is to retard the infiltration of normal businesses in the first instance by denying to racketeers the source of their investment funds. It seems clear to us that the prophylactic aim of Title IX is better served in th latter case than in the former where the corruption of regular commerce is a fait accompli.

In its preface to the Organized Crime Control Act, the Congress expressly found that the primary source of revenue for organized crime lay in a variety of illegal enterprises such as that challenged in the instant case:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; . . .(84 Stat. 922-923)

Senator McClellan averted to this same phenomena in advocating passage of Title IX before the Senate, observing that organized crime

> " . . . operates vast illegal enterprises that produce an annual income of many billions of dollars. This combine has

> so much power and influence that it may be described as a private government of organized crime." 12/
>
> These groups are chiefly active in syndicated gambling, the importation and distribution of narcotics, and loan sharking, each an offense which is parasitic, corrupting, and predatory in character, 116 Cong. Rec. 586, (Jan. 21, 1970).

The Senator further observed:

> Organized Crime groups, moreover, have not confined their villanity to traditional criminal endeavors, but have increasingly undertaken to subvert legitimate businesses and unions. [Id.]

The Congress recognized that it is with funds derived from illicit enterprises that organized crime attempts to infiltrate businesses through large-scale investment:

> (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes . . .[84 Stat. at 923]

It is in this context that statements in the legislative history of the Act - to the effect that the purpose of Title IX is "the elimination of the infiltration of organized crime . . . into legitimate organizations operating in interstate commerce" 13/ - must be considered. Recognizing Congress's awareness that such infiltration is possible because of the income generated from the conduct of illicit enterprises, it would be anamolous to

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12/ Quoting from S. Rept. No. 72, Organized Crimes and Illicit Traffic in Narcotics, 85th Cong., 1st Sess., at 117 (1965).
13/ S. Rep. 91-617, supra, at 76.

argue that the legislature, having provided an all-encompassing definition of "enterprise",did not intend to attack the sources of organized crime's investment in regular commercial establishments, as well as actual instances of infiltration. Section 1962(a) of course prohibits money derived from a racketeering activity from being invested in any enterprise, but the source of income for a particular investment may be difficult to prove. The Congress consequently sought to provide alternative methods and explicitly created a "threefold prohibition" (See. S.Rep. 91-617, supra, at 159, H.R. Rep. 91-1549, 91st Cong., 2nd Sess. (1970) at p. 57 to attack the problem, providing law enforcement authorities with a variety of tools.

"Title IX . . . provides the machinery whereby the infiltration of racketeers into legitimate businesses can be stopped and the process reversed when such infiltration does occur." 116 Cong. Rec. 35,295 (Oct. 7, 1970), [remarks of Congressman Poff, cited in the Boeller decision (402 F. Supp. at 59)]. Congressman Poff went on to explain Title IX in the broad terms found in the statute which he, too, characterized as ". . . a carefully dra[illegible] . . . body of legislation. . ."[Id.]:

> Title IX mak[illegible], a crime for anyone to acquire, maintain, or conduct any enterprise engaged in interstate or foreign commerce through a pattern of racketeering activity or collection of debts incurred in an illegal usury operation. It is also made criminal for anyone to invest in an enterprise, with certain limitations, funds that were derived from either a pattern of racketeering activity or collection of debts incurred in an illegal usury operation . . . [Id.; emphasis added]

The objective to insulate the channels of regular commerce from the vast economic power of organized crime is clearly served by an attack upon the sources of such economic power. The legislative history accordingly provides no reason to doubt that the Congress intended the broadly based attack which the plain words of the statute evidence.

B. The Organized Crime Control Act Was Also Intended As A General Prosecutorial Tool Against Major Criminal Activity And Thus Application Of Section 1962(c) To Illegal Enterprises Is Consonant With This Purpose.

Many portions of the legislative history of the Act, which we shall outline below, do not even distinguish between types of enterprises when describing the workings of Title IX. This is not surprising because, as Judge Bartels noted in Castellano, the legislative desire to prevent infiltration of normal businesses was only one of the purposes of the Act:

> "While the legislative history demonstrates that one of the targets of Congress in enacting the law was the infiltration of legitimate businesses by racketeers, it was . . . not its only concern. Because Congress intended to generally deal with organized crime's influence on the American economy, it gave a very broad meaning to the term 'enterprise', which it defined to 'include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'"

* * * *

> [T]here is nothing in these reports or the legislative history of the statute which indicates that this purpose [to protect regular businesses] was the sole purpose of Section 1962. [App. 41]

This broader Congressional purpose with which Section 1962(c) is in full comport, is highlighted by the preface to the Act: "It is the purpose of this Act to seek the eradication of organized crime in the United States . . ." 84 Stat. at 923.[14/] The Act was intended generally "to deal with the presence of organized crime in the United States." S. Rept. 91-617, supra, at 32. See also the comments of Congressman Clancy during debates on the Act:

> Organized crime today represents a serious threat to the well being of this entire Nation. It is an evil which is gradually infiltrating and poisioning every phase of American life. It is corrupting our society, our economy, and our future. The money and power gained by the masters of organized crime is amazing. This illegal menace is entering into every phase of our lives. It drains countless dollars from our economy, it corrupts our free enterprise system and our democratic processes . . . 116 Cong. Rec. 35206 (Oct. 6, 1970)

Congress thus also intended the encatment to constitute a broad-based attack upon major criminal activity and while Section 1962(c) contributes to preventing the infiltration of commercial businesses, it also constitutes a highly useful

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14/ See also Iannelli v. United States, 420 U.S. 770, 786.

proscription against large-scale criminal undertakings in general. Many portions of the legislative history of the Act evince this intent to proscribe specified criminal activities, embodying a significant magnitude, carried on through a pattern of racketeering activity or collection of unlawful debt.

> This title creates a new chapter in Title 18, entitled "Racketeer Influenced and Corrupt Organizations," which contains a threefold standard (1) making unlawful the receipt or use of income from "racketeering activity" or its proceeds by a principal in commission of the activity to acquire an interest in or establish an enterprise engaged in interstate commerce, (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity," and (3) proscribing the operation of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity." (emphasis added) S. Rep. 91-617, supra, at 32. 15/

Later in the Senate Report, after noting that one of the purposes of Title IX is to prevent infiltration of commercial businesses, the Report also pointed out that the proscriptive intent of the legislature was far broader than that single purpose:

15/ See also H.R. Rep. 91-1549, 91st Cong. 2nd Sess (1970) at 35.

> Subsection (b) [18 U.S.C. 1962(b)] prohibits acquisition or maintenance of an interest in an enterprise through the proscribed pattern or collection of unlawful debt. There is no one percent limitation here as in subsection (a) because (a) focuses on legitimate acquisition with illegitimate acquisition through the proscribed pattern or collection. Consequently, any acquisition meeting this test is prohibited absolutely.
>
> Subsection (c) [18 U.S.C. 1962(c)] prohibits the conduct of the enterprise through the prohibited pattern or collection. Again, there is no limitation on the prohibition. S. Rep. 91-617, supra, at 159. 16/ (emphasis added)

In Congressional hearings, cited within the Senate Report, dealing with Title IX, Paul J. Curran, Chairman of the New York State Commission of Investigation, advocated legislation dealing both with criminal activity resulting in the acquisition of businesses and with independent illicit criminal undertakings:

> From gambling, narcotics, and loan sharking . . . [organized crime] has extended its tentacles into the field of commerce and industry. It has utilized its vast resources to infiltrate diverse kinds of legitimate businesses. In our investigations, the commission has found that the means used by racketeers to penetrate and to gain control of legitimate business, or simply to engage in extortion, ranged from old-fashioned muscle and violence to more sophisticated techniques . . . 17/

16/ See also H. Rep. 91-1549, supra, at 57.

17/ Measures Relating to Organized Crime, Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, U.S. Senate, 91 St. Cong., 1st Sess, p. 175, cited in S. Rep. 91-617, supra at 77.

Senator Scott also pointed out the broad purpose of the Act to combat major organized crime in various types of more general endeavors:

> Syndicated crime operates outside legitimate government. It involves thousands of criminals in structures as complex and large as any corporation with law rigidly enforced through terror. Its operations are national and international. Its aims are to monopolize whole fields of activity - legal and illegal - in order to amass huge profits, currently estimated at several billion dollars each year. (emphasis added)
>
> * * * *
>
> S. 30 would help clear America of organized crime. It is an extraordinary constructive piece of legislation. As an example of its constructive nature is Title IX dealing with racketeer influenced and corrupt organizations. (emphasis added) 116 Cong. Rec. 819-820 (Jan. 22, 1970)

Also indicative of the intended broad reach of Title IX is the Senate Report's discussion of the civil remedies contained therein Section 1964. After noting that Title IX "brings to bear the infiltration of organized crime into legitimate business or other organizations the full panoply of civil remedies" [emphasis added], the Report states that "title IX seeks essentially an economic, not a punitive goal," emphatically described as follows: "to free the channels of commerce from predatory activities . . .", S. Rep. 91-617, supra, at 81. To exemplify this purpose, the Report specifically cites a case involving an enjoinder action brought against an illegal enterprise, namely a gambling house [Id, citing at note 11,

Respass v. Commonwealth, 131 Ky. 087, 115 S.W. 1131, 1132 (1909)]. Thus, Congress has left little doubt regarding the broad applicability of the civil provisions of Title IX. In this respect, it is particularly significant that the scope of the civil provisions - in terms of the kinds of activities covered - is the same as set forth in the criminal provisions, since Section 1964 is intended "to prevent and restrain violations of Section 1962" [18 U.S.C. 1964(a)].

This broad purpose is evident elsewhere in the Senate Report on Title IX. Prior to its discussion of Title IX's new remedies, both criminal and civil, the Report observes:

> What is needed here, the Committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must lie made on their source of economic power itself, and the attack must take place on all available fronts.[S. Rep. 91-617, supra, at 79]

Thus, while the legislative history of Title IX clearly evinces a Congressional concern with the infiltration of legitimate businesses by racketeers, it was not Congress' only concern, as Judge Bartels observed in Castellano (App. 33, 41). Consistent with the broad purpose to attack the economic base of organized crime, Congress made "any enterprise" in or affecting interstate or foreign commerce, as that term is broadly defined, a target of Title IX. Contrary to the decision reached below, the legislative history of Title IX does not refute its plain language, but merely evinces a principal objective to protecting

legitimate commerce from racketeers, an objective which is well served by an attack upon organized crimes sources of economic power, whether they be ostensibly legitimate or plainly illegitimate.

III. THE FACT THAT CERTAIN TYPES OF GAMBLING ACTIVITIES ALSO FALL WITHIN THE PURVIEW OF 18 U.S.C. 1955 DOES NOT PRECLUDE A CONTEMPOREANEOUS APPLICATION OF SECTION 1962(c), NOR DOES A BROAD INTERPRETATION OF SECTION 1962(c) EXPAND FEDERAL JURSIDICTION BEYOND THE LIMITS INTENDED BY CONGRESS.

A. Congress Intended That Section 1955 and 1962(c) Could Be Simultaneously Charged.

The decision below was in part based upon the consideration that 18 U.S.C. 1955 (Title VIII of the Organized Crime Control Act) also proscribes certain types of gambling activities.[18/] Judge Mishler determined that "common sense" dictated that Congress "did not adopt two laws which cover the identical crimes." (App. 20). In our view this reasoning is not well founded, for dual statutory application could arise if a gambling business were conducted through the auspices of a normal commercial enterprise. In such a case, the individuals involved would also be subject to prosecution under both Section 1962(c) and Section 1955.

In any event, the conclusion that Congress did not intend to adopt two laws addressing similar offenses is not accurate. To establish a 1962(c) offense, the government must

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18/ Section 1955 makes it an offense to conduct, finance, manage, supervise, direct or own a gambling business which operates in violation of state law, involves five or more persons, and operates for thirty days or enjoys revenues of $2,000 on a single day.

prove the commission to two separate state or federal criminal offenses denominated as racketeering activities in Section 1961(1). Thus any charge under Section 1962(c) - whether predicated upon gambling or any other offense listed in Section 1961(1) - may also involve prosecution for the underlying racketeering activities. See e.g., United States v. Parness, supra, where the defendant was convicted for both a 1962(c) violation and the offenses which constituted the charged pattern of racketeering activity, in that case, causing interstate transportation of stolen property (18 U.S.C. 2314). The position below thus seems to suggest that one charged with 1962(c) receives immunity from indictment for the underlying offenses, at least where the underlying offense constitute violations of Section 1955. No such intent is apparent from the statute. To the contrary, given Congress' indisputable concern with organized crime, it clearly sought to provide a separate and additional remedy to be available when criminal activities attain such a magnitude as to constitute a pattern of racketeering activity as defined in Section 1961(5).

A mere reading of Section 1962(c) and the definition portion of Title IX, Section 1961, establishes that Congress did intend to provide for prosecution under both Section 1955 and 1962(c) when gambling constitutes the underlying pattern of racketeering activity. Sections 1955 and 1962(c) were, as discussed above, enacted as part of the same legislation, within Titles VIII and IX, respectively, of the Orgnanized Crime Control Act. And within the definition of racketeering

activity in Section 1961(1), the Congress included Section 1955 violations. Indeed, in the original version of Title IX, e.g., Senate Bill S. 1861, 91st Cong. 1st Sess. (introduced April 18, 1969), the definition of racketeering activity did not include Section 1955 offenses, but they were specifically included in the final enactment of Title IX. Thus it is apparent that the legislature fully envisioned that if a Section 1955 offense were included in a defendant's pattern of racketeering activity through which an enterprise was conducted, he could be charged with both offenses.

Contrary to the district court's assumption, it is not at all unusual for the legislature to enact statutes capable of being simultaneously invoked upon the commission of a single act. The classic case in this regard is of course Gore v. United States, 357 U.S. 386 (1958), wherein from a single sale of drugs, the defendant was charged with selling illicit durgs (1) not in pursuance of a written order, (2) not in the original stamped package, and (3) with knowledge that the drugs had been unlawfully imported. This dual or multiple application is generally permissible, the Court determined, in words applicable to the instant case: "The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic." Id. at 389.

Consequently, the Court upheld the traditional test enunciated in Blockburger v. United States, 284 U.S. 299 (1932), for assessing the propriety of invoking different statutes for the same general transaction:

> The applicable rule is that where the same act or transactions constitutes a violation of two distinct statutory schemes, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. [284 U.S. at 304].

This standard, as the Court recently reiterated, dwells not on the particular evidence adduced at trial, but upon a comparison of the elements of each offense.

> "[T]he Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. Iannelli v. United States, 402 U.S. 770, 785, n. 17. 19/

Under the Gore-Blockburger standard, a prosecution for both Section 1955 and 1962(c) violations is clearly permissible. Under Section 1955, the prosecution must prove that the defendant (1) participated in a gambling business; (2) that the enterprise violated state law; (3) that it involved five or more persons; (4) that it operated for thirty days or acquired revenues of $2,000 on a particular day. Under Section 1962(c), in addition to the defendant's participation in the enterprise involved, the government must prove the the business affected or was involved

19/ See also United States v. Leibowitz, 420 F.2d 39, 42-43 (2nd Cir. 1969).

in interstate commerce. And even if the underlying basis of the racketeering activity through which the business was conducted involved gambling, the prosecution must establish, to prove a pattern of racketeering activity, two separate violations of Section 1955.[20/]

B. The Legislature Intended An Expansion Of Federal Criminal Jurisdiction Through Title IX.

The Moeller decision also questioned whether Congress had intended, through Title IX, to significantly expand federal criminal jurisdiction. However, this inquiry is answered in the very preface to the Act wherein the legislature stated in part its explicit intent " . . . to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 923.

The Congress, during its deliberations upon the Act, considered carefully the appropriate scope of federal criminal jurisdiction and precisely set the limits found within Title IX. As originally proposed in Senate Bill S. 1861, Section 1961 defined racketeering activity, in regard to state offenses, as " . . . any act involving the danger of violence of life, limb, or property, indictable under State . . . law and punishable by imprisonment for more than one year." On recommendation of the Department of Justice, this was considered too broad

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20/ In many cases, of course, the predicate pattern of racketeering activity will involve offenses other than the gambling.

a definition which " . . . would result in a large number of unintended applications as well as tending toward a complete federalization of criminal justice." S. Rep. 91-617, supra, at 121-122.

Consequently, the definition of racketeering activity was amended, as to State offenses, to its more limited current form which includes only certain enumerated violations:

> (1) "racketeering activity" means any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargable under State law and punishable for more than one year.

This amendemnt thus constituted a conscious and precise placement of the federal jursidiction as to Section 1962(c) offenses. It was specifically intended to expand that jurisdiction, where the other elements of 1962(c) are met, to those " . . . statutes now characteristically violated by members of organized crime." S. Rep. 91-617, supra, at 34.

This expansion, we note, is certainly not without limits. Section 1962(c) as we interpret it can hardly be characterized as an open-ended incursion into state law enforcement. First, it must be established that the defendants involved here engaged in criminal activity of a significant magnitude i.e., the enterprise must be conducted through a "pattern of racketeering activity" which requires proof of the commission of two racketeering offenses listed in Section 1961(1). Secondly, the enterprise must be engaged in or its activities

must affect interstate commerce. This Court has been particularly vigilant, in honoring the principles of federalism, in strictly requiring adequate proof of this element in prosecutions under other similar statutes. See United States v. Merolla, 523 F.2d 51 (2nd Cir. 1975); United States v. Archer, 486 F.2d 670 (2nd Cir. 1973). These requirements, and not limitations engrafted upon the plain reach of the statute, represent the appropriate and conscientiously determined scope of Congress' broad-based attack upon the source and exercise of the economic power of racketeers.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the district court dismissing counts one and two of the indictment should be reversed, and the case remanded with orders to reinstate those two counts of the indictment.

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